civil and religious freedom, it will rapidly and greatly increase progress and improvement in the internal affairs of each nation. It will also introduce *certainty* into the law, as to international rights and duties, so far at least as written and positive language can save uncertainties; thus guarding individuals against unintended violations of the law, and tending to lessen the grounds of controversy between nations. It will also provide a tribunal to which nations shall be bound to refer matters of dispute, and which, with authority, will declare the principles upon which all rights and obligations are to be determined; and, by the annual conference of the representatives of nations for the discussion of the provisions of the public law, their amendment, and the facilitation of intercourse, which is provided for, will insure the definite settlement of the law on all new or disputed questions, and the reciprocal adoption of modifications and improvements, thus placing all nations "on the basis of complete reciprocity of right and equal justice" in all their relations with each other, giving to each nation only what it is prepared to concede to others in return; placing each under the protection of every other, and multiplying and strengthening, and preventing the destruction of ties which bind all together.

HOWARD PAYSON WILDS.

NEW YORK.

RECENT AMERICAN DECISIONS.

Supreme Court of Ohio.

WALKER v. CITY OF CINCINNATI.

It is settled in Ohio that independent of a constitutional prohibition, it is within the legitimate scope of legislative power to authorize a municipality to aid in the construction of a public improvement such as a railroad, by becoming a stockholder in a corporation created for that purpose, and to levy taxes to pay the subscription.

The public or corporate interest in an improvement rather than its particular location determines the question as to the right of taxation for its construction; and therefore the fact that the improvement contemplated will lie mainly outside of the state can make no difference.

The Constitution of Ohio provides that "The General Assembly shall never authorize any county, city, town, or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money or loan its credit to, or in aid of, any such com-

pany, corporation, or association." An Act of 1869 provided that certain cities should be authorized to construct a line of railroad leading therefrom to any other terminus in this state or in any other state through the agency of a board of trustees consisting of five persons, to be appointed by the Superior Court of such city, provided that a majority of the City Council should, by resolution, have declared such line of railway to be essential to the interest of the city, and the said railway should have received the sanction of a majority vote of the electors of the city, at a special election ordered by the City Council, after twenty days' public notice.

Held, That this act is constitutional.

THE facts are stated in the opinion of the court, which was delivered by

SCOTT, J.—The question presented by this case is as to the constitutionality and validity of the Act of the General Assembly of this state, passed March 4th 1869, entitled "An act relating to cities of the first class having a population exceeding one hundred and fifty thousand inhabitants."

The general scope and purpose of the act is to authorize any such city to construct a line of railroad leading therefrom to any other terminus in this state or in any other state, through the agency of a board of trustees consisting of five persons, to be appointed by the Superior Court of such city, or if there be no Superior Court then by the Court of Common Pleas of the county in which such city is situated. The enterprise cannot, however, be undertaken until a majority of the city council shall, by resolution, have declared such line of railway to be essential to the interests of the city, nor until it shall have received the sanction of a majority vote of the electors of the city, at a special election to be ordered by the city council, after twenty days' public notice.

For the accomplishment of this purpose the board of trustees is authorized to borrow a sum not exceeding ten millions of dollars, and to issue bonds therefor in the name of the city, which shall be secured by a mortgage on the line of railway and its net income, and by the pledge of the faith of the city, and a tax to be annually levied by the council, sufficient with such net income to pay the interest and provide a sinking fund for the final redemption of the bonds.

In pursuance of the authority which this act purports to give, the city council of Cincinnati has resolved that it is essential to the interests of that city that a line of railway to be named "The Cincinnati Southern Railway" shall be provided between the said

city of Cincinnati and the city of Chattanooga, in the state of Tennessee, and this action of the council has been endorsed and approved by a vote of more than ten to one of the electors of the city at an election duly ordered and held pursuant to the requirements of the act. But fifteen hundred of the electors of the city voted against the proposed project, and the grave question here presented, on behalf of these unwilling electors and tax-payers, is whether it is within the power of the state legislature to authorize the taxation of their property by the municipality for the purpose of constructing such a line of railway by the means and in the manner prescribed in the act. The consequences which may reasonably be expected to result from the exercise by municipal corporations of powers such as this act purports to confer, both in respect to public and private interests, are so momentous as to make it difficult to overestimate the importance of the question, and to demand at our hands the most careful investigation and deliberate consideration. This is the first instance in the history of the state, so far as we are aware, in which the General Assembly has undertaken to authorize municipalities to embark in the business of constructing railroads, on their own sole account, as local improvements. The railway contemplated in this instance is several hundred miles in length, extending into other states; the sum authorized to be expended in its construction is a large one, and, should it prove inadequate for the completion of the road, we may reasonably expect it to be increased by subsequent legislation. These considerations, and the apparent abuse of discretion involved in declaring such a work to be so far *local* in its character as to justify its construction by a single city, at the sole expense of its citizens, all give a high degree of interest to the question. But we must bear in mind that the question is one of legislative *power*, and not of the wisdom, or even of the justice, of the manner in which that power, if it exists, has been exercised. Had we jurisdiction to pass upon the latter question we should probably have no hesitation in declaring the act under review to be an abuse of the taxing power. Let us, then, first inquire under what conditions it becomes competent for the judiciary to declare an attempted act of legislation, formally enacted by the General Assembly, to be invalid, by reason of unconstitutionality. Courts cannot, in our judgment, nullify an act of legislation on the vague ground that they think it opposed to a general "latent

spirit" supposed to pervade or underlie the Constitution, but which neither its terms nor its implications clearly disclose in any of its parts. To do so would be to arrogate the power of making the Constitution what the court may think it ought to be, instead of simply declaring what it is. The exercise of such a power would make the court sovereign over both Constitution and people, and convert the government into a judicial despotism. While we declare that legislative power can only be exercised within the limits prescribed by the Constitution, we are equally bound to keep within the sphere allotted to us by the same instrument. On this subject we cannot do better than adopt what is so well said by Judge COOLEY in his treatise on "Constitutional Limitations," pp. 128, 129, when, in speaking of limitations upon legislative authority, he says: "Some of these are prescribed by constitutions, but others spring from the very nature of free government. *The latter must depend for their enforcement upon legislative wisdom, discretion, and conscience.* The legislature is to make laws for the public good, and not for the benefit of individuals. It has control of the public moneys, and should provide for disbursing them for public purposes only. Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good and what are public purposes, and what does properly constitute a public burden, *are questions which the legislature must decide upon its own judgment; and in respect to which it is vested with a large discretion which cannot be controlled by the courts*, except, perhaps, where its action is clearly evasive, and where, under pretence of a lawful authority, it has assumed to exercise one that is unlawful. Where the power which is exercised is legislative in its character, *the courts can enforce only those limitations which the Constitution imposes, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives.*"

And he adds on page 171: "Nor are the courts at liberty to declare an act void because, in their opinion, it is opposed to a *spirit* supposed to pervade the Constitution, but not expressed in words." Citing *People* v. *Fisher*, 24 Wend. 220; *Cochran* v. *Van Surley*, 20 Wend. 381; *People* v. *Gallagher*, 4 Mich. 244; *Bensen* v. *Mayor of Albany*, 24 Barb. 252; *Grant* v. *Courter*, 24 Barb. 232; *Wynshamer* v. *People*, 13 N. Y. 391.

We do not understand it to be claimed that the act in question is an assumption of any of the powers specially delegated to the general government by the Constitution of the United States, nor that it is an encroachment upon the functions and powers conferred by the state Constitution on other departments of the government, and therefore impliedly withheld from the General Assembly. The only questions, therefore, with which we have to deal are: First, whether the act is within the general grant of legislative power which the Constitution declares to be vested in the General Assembly; and, second, does it contravene any of the limitations upon the exercise of legislative power, which are either expressed or clearly implied in any of the provisions of that instrument. And before we can answer the former question in the negative, or the latter in the affirmative, our convictions must be clear and free from doubt: *Lechman* v. *McBride*, 15 Ohio 291; *C., W. & Z. R. R. Co.* v. *Commissioners of Clinton County*, 1 Id. 77, and authorities there cited.

Let us then consider, first, whether this act is within the general scope of legislative power, independent of special constitutional prohibitions. That it is within the legitimate scope of legislative power to authorize a municipality of the state to aid in the construction of a public improvement such as a railroad, by becoming a stockholder in a corporation created for that purpose, and to levy taxes to pay the subscription, must be regarded as fully settled in this state by repeated adjudication. In the case of *C., W. & Z. R. R. Co.* v. *Com. of Clinton County*, 1 Ohio 77, the subject was very fully considered, and it was held that, as the State may itself construct roads, canals, and other descriptions of internal improvements, so it may employ any lawful means and agencies for that purpose, among which are private companies incorporated for the construction of such improvements. And it was said that, for much stronger reasons, counties might be authorized to construct works of a similar kind, of a local character, having a special relation to their business and interests.

And as the state might contract or authorize the counties to construct these works entire, or create corporations to do it entire, it was held that, as a question of power, each might be authorized to do a part. The validity of subscriptions to the stock of railroad corporations, made by counties, cities, towns, and townships of the state, under special legislative authority, has been drawn

in question in many cases which have since come before this court, and in none of them has the authority of the legislature to grant such power of subscription been doubted: 1 Ohio 105; Id. 153; 2 Id. 607; Id. 647; 6 Id. 280; 7 Id. 327; 8 Id. 394; Id. 564; 11 Id. 183; 12 Id. 596; Id. 624; 14 Id. 260; Id. 472; Id. 569: and the cases in which such legislative authority has been upheld by the courts of last resort in other states are too numerous even for reference. A list of more than fifty such cases may be found in Judge COOLEY'S treatise before referred to, p. 119, note 4.

If we even admit that all these decisions have been unwise, yet it is clearly too late to overrule them in this state. Were the question a new one, and properly determinable by the judgment of a court, we should perhaps concur in opinion with Judge REDFIELD, that subscriptions for railway stock by cities and towns do not come appropriately within the range of municipal powers and duties. Yet he is constrained to add that "the weight of authority is all in one direction, and it is now too late to bring the matter into serious debate:" 2 Redfield on Railways 398, 399, note. And if, in the absence of constitutional prohibitions, a municipal corporation may be authorized to aid by stock subscriptions in the construction of a railway, which has a special relation to its business and interests, upon what principle shall we deny that it can be authorized to construct it entirely at its own expense, when its relation is such as to render it essential to the business interests of the municipality? And upon the question of fact, whether a particular road is thus essential to the interests of the city, this court, in the case of the *C., W. & Z. Railroad* v. *Comm'rs*, 1 O. St. 77, already referred to, quote approvingly from the case of *Goodin* v. *Crump*, 8 Leigh 120, in which it was said: "If, then, the test of the corporate character of the act is the probable benefit of it to the community within the corporation, who is the proper judge whether a proposed measure is likely to conduce to the public interest of the city? Is it this court, whose avocations little fit it for such inquiries? Or is it the mass of the people themselves—the majority of the corporation acting (as they must do if they act at all) under the sanction of the legislative body? The latter assuredly."

And in *Sharpless* v. *Mayor of Philadelphia*, 21 Penna. St. 147, it was said by C. J. BLACK: "If the legislature may create a debt, and lay taxes on the whole people to pay such subscrip-

tions, may they not with more justice and greater propriety, and with as clear a constitutional right, allow a particular portion of the people to tax themselves to promote in a similar manner a public work in which they have a special interest? I think this question cannot be answered in the negative. * * * I cannot conceive of a reason for doubting that what the state may do in aid of a work of general utility, may be done by a county or a city for a similar work, which is especially useful to such county or city, provided the state refuses to do it herself and permits it to be done by the local authorities." The question in that case was upon the validity of subscriptions of stock made by the city of Philadelphia in aid of two railroads. One of these was the Hempfield Road, which had its eastern terminus at Greensburg, three hundred and forty-six miles west of Philadelphia. Both subscriptions were sustained, and the court said: "It is the *interest* of the city which determines the right to tax her people. That interest does not necessarily depend on the mere location of the road. * * * But it is not our business to determine what amount of interest Philadelphia has in either of these improvements. That has been settled by her own officers and by the legislature. For us it is enough to know that the city may have a public interest in them, and that there is not a palpable and clear absence of all possible interest perceptible by every mind at the first blush. All beyond that is a question of expediency, not of law, much less of constitutional law." By the act under consideration no railroads are authorized to be constructed, except such as have one of their termini in the city which constructs them. And that a city has no peculiar corporate interest in such channels of commerce as lead directly into it, is a proposition which, to say the least, is very far from being clearly true. And as the public or corporate interest in an improvement rather than its particular location determines the question as to the right of taxation for its construction, the fact that the road contemplated in the present case will lie mainly outside of this state can make no difference. The right of eminent domain cannot be exercised, nor the road constructed in or through other states, without their permission and authority; and the act in question contemplates nothing of the kind. But when such consent is given we suppose the particular direction given to the road can have no bearing on the question of corporate power to construct it. It is also to be

borne in mind that this is not a case in which the legislature has determined a particular public improvement to be of a local character, and has imposed the burden of its construction on an unwilling municipality. But it is the case of an authority given to a city to exercise its powers of taxation only for the construction of an improvement which the local authority have declared to be essential to the interest of the city, and even that cannot be done till a majority of its people have sanctioned the measure by their deliberate votes.

The towns and cities of the state are not the creations of the Constitution. It recognises these municipalities as existing organizations, properly invested by immemorial usage with powers of assessment and taxation for local purposes of a public character, but which were, nevertheless, subject to control and regulation by the state, and that these powers might be abused unless properly restricted. The Constitution itself provides where the power of preventing such abuse shall be vested. It declares, in Art. 13, Sec. 6, that "General Assembly shall provide for the organization of cities and incorporated villages by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power."

It is very clear that this constitutional mandate cannot be enforced according to judicial discretion and judgment. In the very nature of the case, the power which is to impose restrictions so as to prevent abuse, must determine what is an abuse, and what restrictions are necessary and proper. As is said by the learned author from whose treatise we have before quoted, "The moment a court ventures to substitute its own judgment for that of the legislature, in any case where the Constitution has vested the legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion alone will measure the extent of its interference. The rule of law upon this subject appears to be that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognisance.

The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights:" Cooley's Const. Lim. 167, 168.

We do not mean to say that every legislative enactment is necessarily valid, unless it conflict with some express provision of the Constitution. Undoubtedly the General Assembly cannot divest A of his title to property and give it to B. They cannot exercise judicial functions. They can impose taxes only for a public purpose. For it is of the essence of a tax that it be for a *public use.* Nor can they, by way of taxation, impose a burden upon a portion of the state only, for a purpose in which that portion of the state has no possible peculiar local interest. But to justify the interference of a court upon any of these grounds, the case must be brought clearly, and beyond doubt, within the category claimed, and such we are persuaded is not the case in respect to the act in question.

We have been referred to recent adjudications in several states, which are supposed to sustain the claim that taxation cannot be authorized for the construction of a railroad in cases like the present. In the case of *Whiting* v. *Sheboygan Railway Company*, 9 American Law Reg. 156, it was held that "a statute levying a tax for the sole purpose of making a direct gift of the money raised to a mere private railway, in which the state or the taxpayers have no ownership, is unconstitutional."

The case from Michigan of the *People ex rel. Railroad Company* v. *Township of Salem*, 9 Am. Law Reg. N. S. 487, proceeds upon the same grounds. But in the case now before us, the road is the property of the taxpayers who furnish the means to build it. The recent decisions in Iowa are in conflict with the former uniform line of decisions on the subject in the same state, and in all the cases referred to in either of those states the reasoning upon which the decisions rest is in conflict with what we cannot but regard as the settled law of this state.

We are brought to the conclusion that there is nothing in the general purport and main object of this act which places it outside of the sphere of legitimate legislative power. We proceed to consider whether it is in conflict with any of the express limitations imposed by the Constitution. It is claimed that the Gen-

eral Assembly, in the act in question, by authorizing the judges of the Superior Court to appoint trustees of the contemplated railway, have exercised an appointing power which is forbidden by the 27th section of the second article of the Constitution. The argument is, that the trustees whom the act authorized the court to appoint are *public officers;* that their appointment is not the exercise of a judicial function, or of any power that can be conferred on the judges of the court *as such*, and that the conferring of this power of appointment is the creation of a new and independent office, which cannot be filled by the appointment of the legislature, whether the appointment be designated by name or by reference to another office which he holds. In the same connection it is claimed that this power of appointment is conferred on the judges of the Superior Court in violation of art. 4, sec. 14 of the Constitution, which prohibits the judges of the Supreme Court and the Court of Common Pleas from holding any other office of profit or trust under the authority of this state or the United States. And it is further argued that the act is in conflict with art. 2, sec. 20, of the Constitution, because it does not fix the term of office and compensation of the trustees. Are any of these positions clearly well taken?

We shall first inquire whether the power of appointment conferred by this act on the judges of the Superior Court involves the exercise of an appointing power by the General Assembly. Were the judges thereby appointed to a public office? In support of the affirmative of this question, we are referred to the decision of this court in the case of *The State on relation of the Attorney-General* v. *Kennon et al.*, 7 Ohio St. 546. In that case it was held that the selection and designation by name of the defendants by the General Assembly to exercise continuously and as a part of the regular and permanent administration of the government important public powers, trusts and duties is an appointment to office. But we think the present case cannot be brought within the principle of that decision. In this case there is no designation of individuals by name to exercise any public functions whatever. It is clearly the case of an additional power or duty annexed to existing offices, and not the creation of a new office. Upon the filing of a petition by the city solicitor in the Superior Court, praying for the appointment of trustees, it is made the duty of the judges of that court to make such appoint-

ment, and to enter the same on the minutes of their court. The power of appointment and of subsequent removal for unfaithfulness can be exercised only by the *court as such*, and all power of control in the premises on the part of the judges ceases with the termination of their judicial offices. It is true that the act confers a new power on the judges of the Superior Court, but, as was said by Judge SWAN in his concurring opinion in the case referred to, "if adding to the duties or powers of existing offices is an exercise of the appointing power, then every new duty required or power conferred upon any state, county or township officer must be deemed the exercise by the General Assembly of the appointing power, and forbidden by the Constitution."

But it is said that the appointment of these trustees is not the exercise of a judicial function. Suppose this to be so. Does it follow that no functions except such as are purely judicial can be constitutionally annexed to the office of a judge? Can judges not be made conservators of the peace, and as such be required to discharge duties which are not of a judicial character? If no power of appointment to any office or position of public trust can be devolved upon a court or judge, it is certain that many of the statutes of this state are invalid. Quite a number of statutes have been referred to by counsel in which such power of appointment is given to probate judges, judges of the Court of Common Pleas, and judges of the Superior Court. But is it clear that the selection and appointment of these trustees which the act requires to be made by the judges of the Superior Court, and to be entered on the minutes of the court, is in no sense a judicial act? It is the act of a court, and the selection of the trustees and the fixing the amount of their bonds require the exercise of judgment and discretion. Authorities are not wanting to show that such an act is properly judicial in its character.

Thus where a statute of New York authorized a town to issue bonds to aid in the construction of a railroad, and made it the duty of the county judge to appoint under his hand and seal three commissioners to carry into effect the purposes of the act, it was held by the Supreme Court of that state that the act of making such appointment was judicial.

It was said by the court: "The action sought from the county judge is judicial. It is conferred by the statute upon the office of county judge to be exercised under its seal. The duty requires

the exercise of judgment and discretion in the selection of commissioners. The individual is in no way responsible for any act of those he may select in the discharge of their duties. In no sense is the act of selecting commissioners ministerial. They do not act on the command of the county judge. He issues no process to them. If after appointment the persons designated accept and act, they do so under and by virtue of the statute, and not in virtue of the order designating them as commissioners:" *Sweet* v. *Hulbert*, 51 Barb. 315. Nor do we think that these trustees are *officers* within the meaning of that clause of the Constitution, which provides that "The General Assembly, in cases not provided for in this Constitution, shall fix the term of office and the compensation of all officers."

This clause cannot be regarded as comprehending more than such offices as may be created to aid in the permanent administration of the government. It cannot include all the agencies which the General Assembly may authorize municipal and other corporations to employ for local and temporary purposes. These trustees have no connection with the government of the state, or of any of its subdivisions. They have nothing to do with the general protection and security of persons or property. Their sole duty is to procure and superintend the construction of a particular road, and to lease it when constructed. When this shall have been done, so far as appears from the act, their functions end. And in the road, when constructed, the state will have no proprietary interest. All the railroads of the state, though owned and operated by private corporations, are in an important sense public improvements, yet the officers who manage them and superintend their pecuniary interests are not public officers, within the meaning of this constitutional provision. No one supposes that the compensation of such officers must be fixed by the legislature.

It remains to consider, with reference to the general purpose and object of the act, whether there are in the Constitution special limitations on the general legislative power vested in the General Assembly which prohibits the authorizing of a city to raise, by taxation of its citizens, the means for constructing a railroad leading into such city, when such an improvement is deemed by a majority of the citizens to be essential to its interests. It is claimed that the grant of such authority is in violation of article 8, section 6, of the Constitution, which reads as follows:

"Art. VIII. Sec. 6.—The General Assembly shall never authorize any county, city, town, or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money or loan its credit to, or in aid of, any such company, corporation, or association."

It is proper to consider this section in connection with the sections which precede it in the same article, and with some provisions found in other articles which bear more or less directly upon the same and kindred subjects.

The first two sections of this article enumerate the purposes for which the state may contract debts, and the third section declares that except the debts thus specified, "no debt whatever shall hereafter be created by or on behalf of the state." The fourth section declares that "the credit of the state shall not, in any manner, be given or loaned to or in aid of any individual, association, or corporation whatever, nor shall the state ever hereafter become a joint owner or stockholder in any company or association, in this state or elsewhere, formed for any purpose whatever." The 5th section forbids the assumption by the state of the debts of any county, city, town, or township, or of any corporation whatever, unless such debts shall have been created to repel invasion, suppress insurrection, or defend the state in war. In article 12, section 6, it is declared "the state shall never contract any debt for purposes of internal improvement."

And article 13, section 6, provides as follows: "The General Assembly shall provide for the organization of cities and incorporated villages by general laws, and restrict their powers of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power." In *Cass* v. *Dillon*, 2 Ohio 613, 614, it was held, and we think properly, that the limitations imposed upon the state by the first three sections of article 8 were not intended as limitations upon her political subdivisions, her counties and townships. And the clear implications of the 5th section are that counties, cities, towns, and townships may create debts to repel invasion, suppress insurrection, or defend the state in war, which the state may assume, and may also create debts for other purposes, which the state is forbidden to assume. By the 4th section a limitation is imposed in respect to the state, similar to that prescribed in the

6th section in regard to counties, cities, towns, and townships. The state and her municipalities and subdivisions are clearly distinguished, and treated of separately. It is to the latter that the inhibitions of the 6th section relate. What are the extent and purport of those inhibitions? Its own language must furnish the answer to this question, if that language be plain and unambiguous. Of course, I do not mean that we are bound to adhere strictly to the letter, without regard to the evident meaning and spirit of the instrument. The fundamental law of the state is to be construed in no such narrow and illiberal spirit. On the contrary, it is to be construed according to its intention where that is clear, and that which clearly falls within the reason of the prohibition may be regarded as embodied in it. Still it is very clear that we have no power to amend the Constitution, under the color of construction, by interpolating provisions not suggested by the language of any part of it. We cannot supply all omissions, which we may believe have arisen from inadvertence on the part of the constitutional convention. Recurring, then, to the language of this section, it is quite evident that it was not intended to prohibit the construction of railroads, nor, indeed, to prohibit any species of public improvements.

The section contains no direct reference to railroads, nor to any other special classes of improvements or enterprises. The inhibitions are directed only against a particular manner or means by which, under the Constitution of 1802, many public improvements had been accomplished. And its language is sufficiently comprehensive to embrace every enterprise involving the expenditure of money and the creation of pecuniary liabilities. Under the Constitution of 1802, numerous special acts of legislation had authorized counties, cities, towns, and townships to become stockholders in private corporations organized for the construction of railroads, to be owned and operated by such corporations. The stock thus subscribed by the local authorities was generally authorized to be paid for by the issue of bonds, which were to be paid by taxes assessed upon the property of their constituent bodies. Many of these enterprises proved unprofitable, and the stock became valueless. Some of them wholly failed. Heavy taxation followed to meet and discharge the interest and principal of the bonds thus issued. Towns and townships were induced to attempt repudiation of their contracts.

And, as the records of this court abundantly show, the assessment and collection of the taxes which the preservation of good faith required, had repeatedly to be enforced by *mandamus*. In many, if not all of these cases, it was alleged that the stock subscriptions sought to be enforced had been voted for and made under the influence of false and fraudulent representations made by interested officers and agents of the corporation to be aided by the subscription. At the time of the formation and adoption of the present Constitution, these evils had begun to be seriously felt, and excited the gravest apprehensions of calamitous results. Under such circumstances, this section was made a part of the state Constitution.

It may be well again to recur to its language: "The General Assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever, or to raise money for, or loan its credit to, or in aid of, any such company, corporation, or association."

The mischief which this section interdicts is a business partnership between a municipality or subdivision of the state and individuals, or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders, nor furnish money or credit for the benefit of the parties interested therein. Though joint stock companies, corporations, and associations only are named, we do not doubt that the reason of the prohibition would render it applicable to the case of a single individual. The evil would be the same whether the public suffered from the cupidity of a single person or from that of several persons associated together.

As this alliance between public and private interests is clearly prohibited in respect to all enterprises of whatever kind, if we hold that these municipal bodies cannot do on their own account what they are forbidden to do on the joint account of themselves and private partners, it follows that they are powerless to make any improvement, however necessary, with their own means, and on their own sole account. We may be very sure that a purpose

so unreasonable was never entertained by the framers of the Constitution.

Besides, if this section is to be construed so as to prohibit municipal corporations from making improvements on their own account and with their own means, then the fourth section of this same article, which is quite similar in language, must be held to prohibit the making of any improvements by the state, on her own account and with her own means. This would not only be highly unreasonable, but would conflict with the clear implications of the section which prohibits the state from *contracting any debt* for purposes of internal improvements.

This implies that the state may make all such improvements as will not involve the creation of a debt.

We find ourselves unable, therefore, upon any established rules of construction, to find in this section the inhibition claimed by counsel to arise by implication.

It may be, and indeed I think it very probable, that had the framers of the Constitution contemplated the possibility of the grant to a municipal corporation of such powers as the acts under consideration confer, they would have interposed further limitations upon legislative discretion. But omissions of such a grave character surely cannot be supplied according to the conjectures of a court.

It is agreed, however, that the trustees of the contemplated railway are a corporation, and that the act in question violates the terms of this section, by authorizing the city to raise money for and loan its credit to this corporation to enable them to construct a railroad.

We think it unnecessary to inquire whether the trustees provided for by the act are in any sense a corporation or not. For if they are an association or organization of any kind whatever, having a property interest in the road distinct from that of the city, then the objection is well taken. The inhibitions of this section are not directed against *names*.

But it is clear that these trustees are a mere agency through which the city is authorized to operate for her own sole benefit. Neither as individuals, nor as a board, have they any beneficial interest in the fund which they are to manage, or in the road which they are to build.

They are *in fact*, as well as *in name*, but *trustees*, and the sole

beneficiary of the trust is the city of Cincinnati. They are authorized to act only in the name and on behalf of the city.

Looking therefore to the substance of things, this case cannot be brought within the terms of the prohibition unless we are to regard the city itself as being one of the corporations for which money is not to be raised, nor a loan of credit made.

We do not understand counsel as relying upon any other grounds of objection to the validity of this act than those which we have considered, and are of opinion that the judgment of the court below must be affirmed.

We confess, very sincerely, to having read the foregoing opinion with interest, and at the same time, with some degree of surprise. For if we comprehend the scope and history of the case, it is nothing less than a deliberate and successful attempt of the legislature, or of interested parties through the legislature, to evade the provision of the existing Constitution of the state of Ohio, by allowing the city of Cincinnati to build a railway from thence, through the state of Kentucky, to the city of Chattanooga, in the state of Tennessee. The provision of the Constitution is twice quoted in the opinion, and it may not be amiss to repeat it here. "The General Assembly shall never authorize any county, city, town, or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or loan its credit to or in aid of any such company, corporation, or association." The court, very properly recognise the fact that this prohibition would extend equally to any work carried on by a single person.

And the court, in stating the history of this prohibition in the Constitution, also recognise the fact, that it was aimed at the aid which the municipalities had, under the former constitution, stipulated to render these corporate associations in the construction of railways, and which had, in many instances, to be enforced by *mandamus* from that court. The court then say: "Under such circumstances this section was made a part of the state Constitution." The court discuss, very carefully, the question how far the words of the Constitution can fairly be made to embrace the present mode of aiding in the construction of this railway. The mode here adopted, it will be seen from the opinion, was to have the Superior Court of the city appoint a board of five trustees, who had authority to borrow a sum of money, not exceeding ten millions, and issue the bonds of the city for the amount, and a mortgage of the railway and its income; and the city were to raise, by tax upon its inhabitants and their property, sufficient to pay any deficiency in the income of the road, to meet the interest and such a sinking fund as would ultimately pay the principal of the bonds. This of course was first to be approved by the city council, and by the electors of the city, by a majority vote.

The question then recurs, whether this mode of constructing the railway on the credit and at the expense of the city itself, is anything less than an evasion of the prohibitory clause in the Constitution already referred to. To a plain, simple man, who had not schooled himself in the refinements of nice constructions of language, there would be slight difficulty in finding a satisfactory

answer to such an inquiry. It would be simply equivalent to asking whether, if the city of Cincinnati were prohibited from obtaining any legislative permission, whereby they might join in the construction of railways, this prohibition would hinder their obtaining a legislative grant to build the entire railway? In this view it would merely amount to the question, how far a prohibition extending to all the parts would embrace the whole. And the court feel compelled to confess, that the prohibition of the constitution was no doubt intended to embrace all modes of aiding in the construction of railways, through the instrumentality of taxation, or credit. For, says the learned judge, "It may be, and indeed I think it very probable, that had the framers of the Constitution contemplated the possibility of the grant, to a municipal corporation, of such powers as the acts under consideration confer, they would have interposed further limitations upon legislative discretion." In other words: The Constitution, by the prohibition of all then known modes of aiding in the construction of railways, no doubt intended to prohibit all possible modes. This is certainly a very wise and just conclusion, and one eminently worthy the highest judicial tribunal in the great state of Ohio. But what shall be said of the conclusion, that although this prohibition was intended to reach the case in hand; although the case is made to avoid the prohibition, in terms, by the merest evasion; yet this court is too impotent to arrest such an obvious evasion; but must endorse it, as just and valid in law?

We know, very well, that through the imperfection of all written law, it is sometimes not only possible, but very probable, that its real intent will be so imperfectly expressed, that the courts will find it impossible to carry such intent into full effect. And we are not disposed to argue the point here, whether this is one of that numerous class of cases. But we cannot forbear to say, that if the court had exercised the same degree of ingenuity, in showing that where language is sufficient to give the clear sense of the prohibition to all men of plain common sense, and always speaks the same imports, the courts are not allowed to stultify themselves by affecting not to comprehend what in fact no two sane minds can understand differently, in order to allow the legislature to override the Constitution of the state; if this had been attempted with the same zeal and ingenuity which are expended in the opposite direction, the opinion would have reached a far more satisfactory result, and one which no honest face need blush to recognise. But, as it is, we can scarcely regard the decision as very well calculated to uphold the highest sense of judicial skill and dexterity in reaching the acknowledged justice and honest import of the law. We regard all such refined arguments, as this opinion presents, in favor of the imperfection of the language of the Constitution, while at the same time recognising its manifest and undoubted meaning, obtained through that same language, and finally allowing the latter to fail of accomplishment through the defects in the former, made more obvious by speculative refinements; we cannot but regard all such labor as affording an education for the bar, which in the long run brings them to estimate scholastic refinements of language as of more value and esteem, than that honest, blunt, outspoken construction of language, which strikes for the truth under all circumstances, and strips it of all disguises. But in saying this, we by no means intend to impugn either the wisdom or ability of the decision, which are most unquestionable; but only to suggest, that it always has an ugly look in an opinion to recognise one meaning,

purpose, and intention in the law, and then to give it a precisely opposite construction. Such a course cannot fail to produce a demoralizing effect upon the profession, and to impress the mass of citizens with the belief that courts exist to pervert the laws, rather than to enforce them; all of which is specially unfortunate and damaging in a country, like our own, where there is no check upon rash and evasive legislation except through the judiciary. Those who are not interested in carrying through such an evasion of the fundamental law, will regard the court as scarcely less than accessary to the virtual fraud by which the fundamental law of the state is overridden. All we can say by way of suggestion of improvement in the opinion of the learned judge is, that he was not bound by any sense of honor or liberality to admit the prohibitions in the Constitution as clearly intended to reach the very evil which the law in question is designed to effect. It would have been more consistent and more satisfactory to have argued that no such thing is fairly inferable from the language of the Constitution. All we desire to say further is, that if we could see clearly to recognise, what the opinion does, that the prohibition was intended to reach this and all other modes of aiding in the construction of railways, we should have felt compelled to declare the law void as being in violation of the true spirit and intent of the Constitution.

Upon the general features of the law little need be said. It seems that every new experiment, in building railways, through the instrumentality of taxation, in towns and cities, is made only a new puzzle for the courts. It must be sustained; and the question is, how it can be most plausibly done. We suppose that if this had been the first case presented to the courts there could have been but one opinion in regard to it. All would have exclaimed against the attempt to build railways over the whole continent at the expense of a single city. For if the principle of this case is maintainable, the city of New York might have built all the railways to the Pacific coast.

I. It would seem the courts must have some control over the powers of the legislature to tax towns and cities for the construction of railways. There could be no question, that if this statute were for building a railway from California to Oregon, it clearly would be void. The work, therefore, must be specially an improvement of the town or city taxed for its construction. It need not terminate in such town or city; but it must be a feeder or contributor to the commerce of such town or city: *Sharpless* v. *The City of Philadelphia*, 21 Penn. St. 147. It is not enough to justify local taxation for constructing public works, that it will be useful to the district taxed. It must be specially beneficial to that particular district above all others.

If a public work is only generally useful to the whole state, and it is to be made by taxation, it should be done by general taxation, commensurate with the benefit. And this will naturally raise the question, how far the states, by means of public taxation, can construct works of internal improvement, like canals and railways, situated entirely in other states. Congress may no doubt construct such public works, extending through different states. The Constitution secures to Congress the right to regulate the commerce of the different states with each other. And this must of necessity embrace commerce by land, as well as by water. It would be absurd to suppose, that Congress might regulate the commerce along the bed of the great rivers of the country, but that it could not, at the same time, regulate the commerce upon the banks of such rivers, in railways and canals. There seems to have obtained, to some extent, an opinion, that commerce, as defined in the United States constitution, was in-

tended to be restricted to that carried on by navigation. No doubt that was its primary import and purpose; but we can scarcely suppose the national courts will give it any such limited and restricted application, now that the largest proportion of the internal commerce of the several states is carried on by means of railways; and in fact, a considerable proportion of the internal commerce of the states, which was at one time carried on by means of the river and lake navigation, is now carried on by means of railways. So that if the states were to construct railways in other states, the traffic upon these same railways, both in passengers and goods, will inevitably fall under the control of Congress. We think, therefore, it will scarcely be claimed that one state, by means of public taxation, can construct public works of internal improvement in other states, because that will contribute to the development of the resources of the state creating such public works. One state can have no possible control over public works in another state, and no legitimate interest in their construction or maintenance. We have never known any one to claim any such extension of state power. It has been claimed by some, that the states should build and operate all the railways within their own limits; but we are not aware, that it has ever been claimed, that it was competent for one state to build, or own, or even operate a railway within the limits of another state, unless the ownership or control of such railway were acquired by means of indebtedness and a mortgage legitimately created. But we think the decision in the principal case must assume that it is competent for one state to build railways in other states, by the legislative consent of such other states, for the purpose of developing its own resources. For if one state cannot, in its sovereign capacity, assume to construct railways in other states, no more could it authorize its municipalities to do so. The municipalities of a state are but political subdivisions of the state, and created and maintained for the mere purpose of carrying into effect a portion of the public functions of the state. A municipality is not a joint stock corporation, which may assume to enter into commercial contracts with the object or purpose of enhancing the amount and value of its property or business. But it must restrict its action to the legitimate performance of its political duties and functions. And it would be absurd and monstrous to claim that what the state could not do for itself, it might accomplish by means of delegating its functions to its subordinate municipalities. That would be to allow one to perform, through the agency of another, what he had no power of himself to do. The state may delegate a portion of its general taxing power to one of its municipalities, where the expenditure of such tax is mainly for the benefit of the district taxed. But it could give no power for local taxation for the accomplishment of an object which, if its benefits were general, the state could not accomplish by means of general taxation.

We should, therefore, hesitate to subscribe to the general doctrine involved in this decision, on the ground that one state can neither by itself or its municipalities, construct and maintain public works of internal improvement in other states. The thing has, no doubt, been done *sub silentio*; and it may have been acquiesced in by some of the decisions on this general question, but we do not recall any such case; and we feel very sure that it is in conflict with acknowledged principles of constitutional law, applicable to our complicated governmental structure.

I. F. R.